Supreme Court, U.S.
FILED
APR 8 1998
CLERK

(3)

No. 97-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PHILIP COATES, DIRECTOR OF THE MASSACHUSETTS DIVISION OF MARINE FISHERIES, *et al.*,
Petitioners,

v.

RICHARD MAX STRAHAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF AMERICAN FOREST & PAPER ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS, NORTHWEST FOREST RESOURCE COUNCIL, SOUTHERN TIMBER COUNCIL, AND S.D.S. LUMBER COMPANY IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI CURIAE*

Amici represent the forest products and home construction sectors of the economy.[1] For several reasons, *amici* are profoundly interested in and affected by the Endangered Species Act ("ESA") issues in this case. *Amici*'s members' business activities are frequently said to "take" ESA-listed wildlife. Thus, they have a substantial interest in questions about the kind of action -- or, in this case, *inaction* -- that creates liability for a "take" under ESA § 9, 16 U.S.C. § 1538(a)(1). Here, state officials were held responsible for a "take" by virtue of their failure to provide greater *affirmative protection* to an endangered whale species when the State issued fishing licenses. This expansive notion of "take" has important implications for *amici* and their members.

Moreover, *amici*'s members' business activities are subject to a variety of state regulatory schemes. State and local officials, threatened with injunctions and possible criminal or civil liability under the liability principles established by the First Circuit, will often deny the permits required by *amici*'s members. The chilling effect that the decision below has on the issuance of building, grading, timber harvesting, and other permits is of grave concern to *amici*.

Further, the decision below requires States to impose broad regulatory restrictions to reduce or eliminate risks that private activities may "take" listed wildlife species. Thus, regulated persons will be subject not only to the ESA's ban on "takes," but also and more immediately to broader state prophylactic rules. By prompting state officials to devise and implement prophylactic rules against third parties to protect the officials

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* certify that counsel for a party did not author this brief in whole or in part and that no person other than *amici* made a monetary contribution to the preparation of this brief.

from "take" liability, the First Circuit has created a system that leads to *over-regulation* beyond "take" by state and local permit-granting agencies. Such over-regulation is an issue of significance for *amici*.

The First Circuit's view that a State may be compelled to regulate to advance federal ESA objectives is inconsistent with both the ESA itself and the Tenth Amendment. Petitioners focus primarily on Tenth Amendment and ESA "proximate cause" issues. *Amici* will address the basic change to the regulatory framework wrought by imposing this type of liability on state officials. *Amici* also suggest that the Petition (particularly its first question) encompasses the following formulation, which focuses on the conduct constituting an ESA "take":

> In light of the Tenth Amendment, does a State commit a "take" or any other enjoinable violation of the ESA where the State fails to use its regulatory program to provide affirmative protection that eliminates or minimizes the risk that the activities of regulated persons or entities might "take" listed wildlife?

Finally, *amici* note that regulated businesses are pervasively affected by the order of the court below, yet might have little ability to mount an effective challenge, other than in connection with this Petition. Thus, their participation as *amici* is especially important.[2]

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[2] To illustrate: The court below directed negotiations between plaintiff and defendants. The product of such negotiations is often an agreement by the State to *increase* regulation. The regulated businesses would bear the burden of that increased "voluntary" regulation by the State. Yet, regulated entities will likely lack standing to complain later that the regulations adopted by the State, under this type of federalized environmental pressure, were prompted in a manner inconsistent with the

(continued...)

Amici therefore file this brief to address important issues that may not be fully apparent on initial review of the Petition.

STATEMENT OF THE CASE

Amici agree with Petitioners' statement of the case and would add the following points of emphasis.

1. The Endangered Species Act assigns protection to members of animal or plant species listed, pursuant to a rulemaking process, as "endangered" or "threatened" (collectively, "listed species"). 16 U.S.C. § 1533.

"Federal agencies," not States or private entities, have affirmative duties to assist in the "conservation" or recovery of listed species. 16 U.S.C. §§ 1531(c), 1533(f), 1536(a)(1). Similarly, only federal agencies have the substantive duty to avoid jeopardizing the continued existence of a listed species and the procedural duty of consultation under ESA § 7(a)(2). *Id.* § 1536(a)(2).

ESA § 6 authorizes use of the "carrot" of federal funding to encourage, but not force, States to use their laws to advance ESA objectives. If the State is certified as having an "adequate and active program for the conservation of" listed species, up to 90% of the State's program to protect listed species will be federally funded as part of a cooperative agreement. *Id.* § 1535(c) and (d); *see* 50 C.F.R. Part 225. In the cooperative agreement with Massachusetts, the National

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[2](...continued)
Tenth Amendment, or even that they go beyond the requirements of the ESA. Thus, *amici* have a special interest in presenting their views and in urging that the Court grant the Petition at this time.

Marine Fisheries Service ("NMFS")[3] did *not* require the measures that were included in the district court's injunction. *See* Record Appendix in Nos. 96-2063 and 96-2345 at 207-10.

2. ESA § 9 makes it "unlawful for any person subject to the jurisdiction of the United States" to "take any such species [an "endangered species of fish or wildlife"] within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). By regulatory extensions, it is also unlawful to "take" most *threatened* fish or wildlife species. *See id.* §§ 1533(f), 1538(a)(1)(e); 50 C.F.R. § 17.3 and Part 227. Thus, the "take" prohibition applies to what are commonly referred to as "listed wildlife species."

The ESA defines "take" in terms of active conduct, not inaction or failure to provide protection: to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" listed wildlife or "to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" has been defined to include a habitat modification action (e.g., cutting trees, capturing by nets), *if* that action "actually kills or injures wildlife."

> **Harm** in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3. In addition, ESA § 9(g) makes it "unlawful for any person subject to the jurisdiction of the United States

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[3] NMFS, within the Department of Commerce, has jurisdiction over listed marine species such as the endangered Northern Right whale, while the U.S. Fish and Wildlife Service ("FWS") has jurisdiction over other listed species. *See* 16 U.S.C. § 1532(15); 50 C.F.R. §§ 222.23(a), 227.4. NMFS and FWS will be referred to as the "Services."

to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section," such as "take." 16 U.S.C. § 1538(g).

3. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), this Court rejected a facial challenge to the "harm" regulation. In *Sweet Home*, all members of the Court agreed that "take" in the ESA "incorporate[s] ordinary requirements of proximate causation and foreseeability." *Id.* at 697 n.9, 700 n.13 (majority opinion); *see id.* at 712 (O'Connor, J., concurring) and 732 (Scalia, J., dissenting). The Solicitor General's briefs in *Sweet Home* had advised that "take" is limited by "principles of proximate causation" to exclude "remote effect[s]" where there are "intervening acts" by human actors.[4] The Department of Justice had earlier argued unsuccessfully in a different case that a *federal agency* (the Environmental Protection Agency) *should not be liable for a "take"* if, following its registration of a pesticide, a private person did "take" listed wildlife by using that pesticide. *See Defenders of Wildlife v. Administrator, EPA*, 688 F. Supp. 1334, 1353-54 (D. Minn. 1988), *aff'd*, 882 F.2d 1294, 1301 (8th Cir. 1989).

4. This case addresses whether Massachusetts violates the ESA when it issues fishing licenses, if the activities of private fishermen who receive those licenses might injure endangered Northern Right whales. The district court found at summary judgment, and the First Circuit affirmed, that the

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[4] Reply Br. for Petitioners at 4 n.4 in *Sweet Home*, No. 94-859 (1995); *see* Opening Br. at 41-50. *See generally* James C. Kilbourne, *The Endangered Species Act Under The Microscope: A Closeup Look From A Litigator's Perspective*, 21 ENVTL. L. 499, 583-84 (1991); Steven P. Quarles *et al.*, Sweet Home *and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act*, ENVTL. L. REP. (Envtl. L. Inst.) 10003, 10006-13 (Jan. 1996).

Commonwealth was the "proximate cause" of ESA § 9(a)(1) "takes" (or, perhaps, "caused" ESA violations under ESA § 9(g)). Pet. App. A-15 to 18, B-3, B-48 to 63.

Whale "entanglement in fishing gear is relatively infrequent" and whales often "survive the entanglement." Pet. App. B-54. There was evidence of "eleven occasions on which Northern Right whales had been found entangled in fishing gear in Massachusetts waters between 1978 and 1995." Pet. App. A-20. One conservative estimate is that fishermen have cast their nets and dropped their lines 100,000 times in Massachusetts waters during that 17-year period. Even assuming that each entanglement was a "take," 11 "takes" means there was a probability of .00011 that any one fishing activity would "take" an endangered whale. The low probability of "take" did not deter the courts below from granting a program-wide injunction.

5. Massachusetts' licensing program did *not* purport to authorize the licensee-fishermen to violate the ESA. In fact, the State ESA prohibits all persons, including State licensees, from taking species "listed under the Federal Endangered Species Act." MASS. GEN. LAWS ch. 131A, § 2. In addition, the state agency has adopted numerous measures to protect the endangered whale. *See* Pet. at 12-15, 23. Thus, the agency did not solicit "take" or direct that "takes" occur.

Instead, the Commonwealth's alleged violation of law lay in its failure to supplement the "take" prohibition of the ESA with its own broad regulatory prohibition to help ensure that licensee-fishermen do not violate the ESA.

6. This case came to the court of appeals on review of an order that denied the State's motion for summary judgment on the ESA and Tenth Amendment grounds, which are again squarely presented in the Petition, and that granted a preliminary injunction. Pet. App. B-3, B-4 to 43, B-48 to 63.

While an "ordinary" preliminary injunction case might not present issues suitable for review, the injunction here imposes immediate affirmative obligations on the State in its sovereign capacity to begin implementing processes to provide further regulatory protection to the whale species. The injunction requires state regulatory action to "minimize the likelihood additional whales will actually be harmed by such gear," requires "substantive discussions with the Plaintiff" on the content of those regulations, and requires the Commonwealth to "apply for an incidental take permit" under 16 U.S.C. § 1539(a) and bear the associated costs. Pet. App. A-2 to 3. Indeed, the court stated that the State's duty goes beyond minimizing the risk of "take" to *eliminating all risks* of "take." *Id.* at A-22 (State "efforts to minimize such entanglements are irrelevant;" the State was correctly enjoined "to prevent the taking of Northern Right whales"), A-37 ("ensuring that any violation would end").

The injunction imposes upon a State a series of affirmative steps -- such as obligations to seek an incidental take permit, to enter into negotiations with Plaintiff, and to develop regulations -- designed, in effect, to moot the case by agreement between the parties before it reaches final judgment. If the case is mooted by virtue of State acquiescence, the regulated community will have to bear the effects of the State's over-regulation.

REASONS FOR GRANTING THE WRIT

By conscripting States to use their regulatory programs to affirmatively protect listed species, the decision below significantly extends the ESA's regulatory reach in a manner not envisioned by Congress. The odd result reached by the First Circuit -- holding the State responsible for a wildlife "take" for failure to better guard against possible "takes" by the actions of private parties -- turns the ESA concept of a

taking of wildlife on its head. Moreover, any interpretation of the ESA that requires a State to use its regulatory authority to advance federal ESA objectives offends this Court's Tenth Amendment jurisprudence. There is *every* reason to construe the ESA, under its own terms and in light of the Tenth Amendment, as precluding the result reached below.

Amici will address the nature of the lower court's ruling (¶ 1); the transformation of the ESA regulatory structure wrought by that ruling (¶ 2); the Tenth Amendment issue raised by that ruling (¶ 3) the proximate cause defect in the ruling (¶ 4); the ruling's inconsistency with the "take" definition set forth in the ESA (¶ 5); and the reasons why neither the *pro se* status of the plaintiff nor the posture of this case should deter the Court from granting the Petition (¶ 6).

1. The First Circuit's approach compels States to enforce the federal ESA by creating an enjoinable ESA violation where state officials fail to use their authorities to effectively eliminate the risk of "take" from the actions of private party permittees. Pet. App. A-2 to 3, A-15 to 18, A-22, A-37. Under this view, state and local officials are threatened with potential civil and criminal liability for violating the ESA unless they structure their regulatory programs to guard against the possibility that private parties will take protected species. *See* 16 U.S.C. § 1540(a) and (b).

Thus, the rulings and injunction of the courts below tell a State how to exercise its sovereign authority -- *i.e.*, its sovereign prerogative to make law that governs the conduct of private citizens. The First Circuit's theory that the State can be enjoined to take affirmative actions to protect listed wildlife presumably would also require the State to police the regulatory restrictions vigorously -- or else be held liable for "takes" for failure to halt the violators.

2. The regulatory framework that results from the First Circuit's decision is inconsistent with the ESA.

As enacted by Congress, the ESA creates direct federal prohibitions on the "take" of listed wildlife by any "person," including private parties who hold state licenses or are otherwise regulated by a State. 16 U.S.C. §§ 1532(13), 1538(a)(1)(B) and (G). The Services and the Department of Justice are granted authority to enforce the ESA; the ESA does not enlist States and other non-federal governmental entities as ESA policemen. *Id.* § 1540(a)-(f). By conscripting States to enforce the ESA, the decision below also is inconsistent with the voluntary approach of ESA § 6, which uses the familiar "carrot" of federal funding to encourage States to use their programs to assist in protecting listed species. *Id.* § 1535(c) and (d).

Further, under the ESA as enacted, a person accused of a "take" may challenge the foundations for the claim of "take." Under the First Circuit's approach, however, the person is more immediately affected by broader state limitations on permits and may not be able to challenge the State's denial of a permit on grounds that the permitted activity would not cause an ESA "take." The commandeering of state regulatory programs to create broad prophylactics against "takes" is inconsistent with the ESA's framework.

This particular controversy concerning the right whale is in federal court only because the Commonwealth took the unusual step of resisting demands to regulate. The far more likely scenario is for state officials, threatened with liability, to "voluntarily" acquiesce and adopt the regulations.[5] Threatened

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[5] For example, FWS issued Northern Spotted Owl Guidelines that were designed to inform timberland owners of the timber harvesting (continued...)

with injunctions and possible criminal or civil liability (or even just bad publicity), state government officials can be expected to acquiesce in demands to structure their regulatory programs to avoid risks that regulated parties would "take" listed wildlife. Local officials "listen when told they may go to jail for issuing a grading permit, notwithstanding the considerable legal uncertainty whether USFWS would have the authority to prosecute a city official for approving development." Robert D. Thornton, *Takings Under Endangered Species Act Section 9*, NATURAL RESOURCES & ENVT. 7, 51 (Spring 1990).

Thus, expansive ESA liability creates a broader *in terrorem* effect on state and local officials, pressuring them to regulate broadly and with bright-line rules. States are likely to create broad rules banning a wide range of productive economic conduct, affecting many people, in order to eliminate the possibility that "takes" will occur in a small number of

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[5](...continued)
restrictions they could follow to avoid any prosecution for "take" of the threatened owl. In many States, commercial timber harvesting on private lands requires a permit from the state forestry agency. The advisory Guidelines became binding elements of state law when FWS informed the States that:

> Their approval of timber harvesting activities that resulted in "take" under the Guidelines could render them liable on a complicity theory. . . . To avoid liability, the states have had to assure that their review and permitting processes do no allow activities that would violate the Guidelines. In this way, the federal agency has in practical effect bound the states to follow the Guidelines. Further, it has conscripted the states as its regulatory agents, to force the nonlegislatively promulgated Guidelines upon private parties.

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like - Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311, 1371 (1992).

instances.[6] In sum, the First Circuit's liability theory creates tremendous pressure to over-regulate.

Further, persons subject to the state-adopted prophylactic regulations may have no opportunity to question the underlying ESA foundations of the regulation that limits their activities. In other words, a fisherman who seeks to engage in his or her trade during the period prohibited by the State will be held liable for violating the broader state regulation. Any attempt by the fisherman to prove that his or her activities have not "taken" any listed wildlife species would be irrelevant to the violation charged.

3. *Amici* agree with Petitioners' analysis of the Tenth Amendment issues. Compelling a State to negotiate and adopt regulations strikes at the heart of a State's sovereignty.

We can well assume that the First Circuit is correct that there is a Tenth Amendment difference between holding state officials liable when *their own* (usually proprietary) activities violate a federal statute and requiring States to enforce federal regulations. *See* Pet. App. A-27 to 33. However, when a court purports to hold state officials liable for violation of a

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[6] *See* Pet. at 12-13. Yet, even a "significant risk of harm" should not authorize an injunction. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 n.5 (1st Cir. 1993). "[C]ourts have correctly interpreted the "harm" prohibition not to extend to an activity that only potentially, as opposed to actually, causes (or will cause) harm." Br. for Petitioners at 46 in *Sweet Home*, No. 94-859 (1995). There are "strong arguments that activities that cause minimal . . . harm will not violate the Act." *Sweet Home*, 515 U.S. at 699. If the risk tolerance level for "take" is near zero, as the court below found, the area off-limits to development becomes larger and the impact on economic activities becomes more substantial. For example, the Working Group established pursuant to the injunction "agreed that zero risk was impossible to achieve in Critical Habitat without a complete prohibition on fixed gear 12 months of the year." Record Appendix in Nos. 96-2063 and 96-2345 at 376.

federal statute for failing to structure state regulatory programs -- clearly an exercise of sovereign authority -- to further federal objectives, then any such distinction disappears.

The ESA interpretation of the court below effectively "'commandeer[s] state governments into service of federal regulatory purposes'" in a manner "inconsistent with the Constitution's division of authority between federal and state governments." *New York v. United States*, 505 U.S. 144, 175 (1992). Just as Congress could not make it a violation of federal law for a state sheriff to decline to conduct a background check on the third-party sale of a handgun (*Printz v. United States*, 117 S. Ct. 2365, 2379-84 (1997)), neither Congress nor the First Circuit can make it an ESA violation for a State to decline to enforce federal ESA "take" concepts against third parties.

Indeed, if state officials are liable under the ESA for failing to impose permit conditions to restrict the questioned fishing practices, the State also likely would be liable if it failed to appropriate sufficient funds and deploy enough personnel to enforce such bars. The First Circuit's theory of ESA liability for state officials cuts to the core of state sovereignty in precisely the manner forbidden by this Court's cases.

Amici suggest that the ESA should *not* be read in a manner that would raise these Tenth Amendment concerns. Petitioners (at 25-28) stress the proximate cause limitation, which we agree with and discuss briefly below. We then describe why the ESA definition of "take" simply cannot reach the kind of failure to protect wildlife at issue here.

4. *Amici* agree with Petitioners that the proximate cause limitation, properly applied, ought to mean that a state agency does not violate the ESA when it merely fails to implement licensing requirements that are stringent enough to prevent any private person from ever "taking" listed wildlife.

The concept of "take" is limited by "ordinary principles of proximate causation." *Sweet Home*, 515 U.S. at 696-97 n.9, 700 n.13, 712-13. One would not ordinarily conceive of a state employee who issues a facially neutral license while sitting in an office as being the proximate cause of a wildlife injury. The licensee's independent environment-disturbing activity -- here, a fisherman who casts his net near an endangered whale -- is the intervening human cause and, indeed, the proximate cause of any "take" of listed wildlife. This would seem particularly clear where the State has directly prohibited such "takes" under other provisions of its own law.

The Department of Justice has historically supported this position that governmental "regulatory authorization of actions by third parties cannot constitute a taking under the ESA." Brief of EPA Appellants at 26, *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (No. 88-5242). The Department argued that EPA's regulatory registration of a pesticide could not constitute a "take" as a matter of law based on the proximate cause logic that the "independent actions of third parties . . . are necessary before any adverse effects to endangered species will occur." *Id.* at 31. *See also* page 5, above; *National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. 384, 392 (D. Wyo. 1987). Thus, the First Circuit's result is contrary to the historic interpretation of the ESA advanced by the United States.

The First Circuit cited several lower court cases (such as *Defenders of Wildlife v. EPA*) that found government agencies liable because they had an opportunity to act to reduce the likelihood of private "take." *See* Pet. App. A-15 to 16. In the climate of pervasive regulation prevailing today, if this remote form of causation suffices to create liability, government agencies at both State and federal levels could be found liable in numerous situations under the ESA and many other statutes. *See* Pet. at 21-22.

In terms of causation, there is no obvious difference between issuing a license that fails to set forth certain restrictions on the one hand, and failing to promulgate or enforce regulations that would have better protected wildlife on the other. Thus, the liability rule approved by the First Circuit cannot be limited to licenses and permits. If a broad notion of causation suffices, remotely connected private "persons" also unfairly face ESA liability, such as banks issuing loans for development activities.[7]

It is true that expansive notions of causation have taken hold in the common law. In certain circumstances, a landlord might, under state law, be held liable for a burglar's assault on a tenant based on the landlord's failure to adequately secure the building. Of course, such liability must be predicated on a finding that the landlord had an *affirmative duty* to provide such protection. The First Circuit cited no source for a finding that the State owed such an affirmative duty to guarantee against small risks of "take." This Court has been reluctant to conclude that state officials, who must rely on public funds to finance any efforts at affirmative protection, are liable for generalized failures to provide affirmative

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[7] The same "take" avoidance standards theoretically apply to all governmental and private "persons." 16 U.S.C. §§ 1532(13), 1538(a)(1) and (g); 50 C.F.R. § 17.3. Consider the plight of a landowner who does not prevent the public from hunting deer or ducks on private lands. Very infrequently, hunters kill grizzly bears or other listed wildlife by mistake. *See Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 939-40 (D. Mont. 1992). If the landowner is liable for all risks of "take" from invitee or trespasser hunters, many landowners will react by prohibiting hunting and other forms of recreation on their lands, and may have to incur additional costs in policing their lands. Moreover, if failing to provide the best affirmative protection is "take," the landowner may be enjoined not just to forego productive land uses that alter habitat but also to spend money to provide the best habitat for listed wildlife.

protection. *See DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189, 199-200 (1989) (discussing the limited circumstances under which an affirmative duty to protect may be imposed).

5. The answer to the question whether the Commonwealth had an affirmative obligation to incorporate these protections in its regulatory scheme may be found in the ESA definition of "take." The panel's view that a State's failure to affirmatively provide the best possible protection for endangered whales is "take" cannot be squared with the ESA definition of "take."

The ESA defines "take" in terms of active conduct: to "harass, harm, hunt," etc. or to "attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The State's inaction, or the failure to provide affirmative protection, does not fit within that definition. *See Sweet Home*, 515 U.S. at 698 n.11 ("deliberate actions"), 719-20 (Scalia, dissenting) ("take" definition requires "affirmative acts").

Even the broadest term in the "take" definition -- "harm" -- makes unlawful only "the act which actually kills or injures wildlife." 50 C.F.R. § 17.3. As the Court held in *Sweet Home*, such acts may include acts of "habitat modification" that indirectly (but without intervening human action) kill or injure wildlife. 515 U.S. at 696-98 (majority opinion), 712 (O'Connor, J., concurring that "parties should be liable under § 1540(a)(1) only if their habitat-modifying actions proximately cause death or injury to protected animals"). The State did not engage in any such affirmative, environment-disturbing act. "Defendants do not place gill nets and lobster gear in coastal waters." Pet. App. B-39. A State's regulatory actions, like EPA's, should not constitute "take":

> As a matter of law, however, EPA's actions in registering pesticides under FIFRA cannot be held to constitute takings

> under the ESA. The act of EPA in registering the pesticides does not "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" protected wildlife.

Brief of EPA Appellants at 27, *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (No. 88-5242).

There is, in any event, a clear difference between finding that an affirmative act harming a listed species by destroying its habitat can qualify as a "take" (as in *Sweet Home*) and concluding that a *failure to affirmatively protect* listed species or their habitat is a "take" (which is the situation presented here). *See Sweet Home*, 515 U.S. at 711, 713-14 (majority opinion), 716-20 (O'Connor, J., concurring, and Scalia, J., dissenting). Here, the only affirmative act appears to be the issuance of a facially neutral license, while the ESA violation consisted of State *inaction* in not regulating private activities more strictly.

Listed species would not be left unprotected if States and others are freed of attenuated liability for "take." Protection against future "take," remedies for "take," and incentives against "take" still will be provided by *suits against the actor whose actions do constitute a "take"* for injunctions, civil penalties, or criminal sanctions. *See* 16 U.S.C. § 1540(a), (b), (e)(6), (g).

6. Finally, neither Mr. Strahan's *pro se* status nor the alleged "interlocutory" nature of the opinions below should deter this Court from granting review.

a. Both courts below found decisive the affidavit evidence and arguments presented by the Conservation Law Foundation ("CLF"). Pet. App. A-20 to 21, A-36, B-7, B-53 to 55, B-67. Though nominally an *amicus curiae*, CLF's submission of evidence and distinct legal theories makes it more like a party. *See* Pet. at 5. CLF is a skilled appellate

advocate, having authored briefs to this Court and other courts on several occasions. Should Mr. Strahan lack counsel, counsel could be appointed. Mr. Strahan's *pro se* status should not prevent the Court from addressing what appear to be clear Tenth Amendment violations and misreadings of the ESA -- particularly in light of the injunction granted below.

b. This Court often has occasion to review interlocutory orders where there are "important and clear-cut issue[s] of law." ROBERT A. STERN *ET AL.*, SUPREME COURT PRACTICE 196 (7th ed. 1993); *see* Pet. at 16. Although this case was before the First Circuit on review of a "preliminary injunction" (Pet. App. A-7), the issues presented here, involving the Tenth Amendment and the scope of the ESA, were addressed and resolved by the district court and court of appeals squarely on their legal merits. Those courts have rejected at *summary judgment* the State's Tenth Amendment defense and position that it was not liable for an ESA violation. Pet. App. A-15 to 18, A-25 to 34, B-3, B-40 to 43, B-48 to 63. Thus, those fully ventilated issues are ripe for this Court's review.

The injunction is quite unusual in that it is not strictly prohibitory. To the contrary, the injunction imposes upon the Commonwealth a series of affirmative steps -- such as obligations to seek an incidental take permit, to enter into negotiations with Plaintiff, and to develop regulations -- that were designed, in effect, to moot the case by agreement between the parties before it reaches final judgment. Since the State has been enjoined in a manner that violates the Tenth Amendment, review is appropriate.

Further, if the Commonwealth ultimately acquiesces in the ruling before final judgment by adopting the regulations or obtaining an incidental take permit -- as States often do when confronted with potential civil and criminal liability -- then the

regulated industry will be forced to bear the harsh consequences of such unjustified regulation, yet never have the opportunity to challenge it on ESA or Tenth Amendment grounds. The Court should resolve in this case these fundamental issues that bear significantly on both the scope of the ESA and the sovereignty of the States.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 8, 1998